

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHEAL SHANOR
Claimant

VS.

OLATHE MEDICAL CENTER, INC.
Self-Insured Respondent

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Docket No. 1,055,652

ORDER

Claimant requests review of the March 7, 2012, preliminary hearing Order entered by Administrative Law Judge Steven J. Howard. Matthew L. Bretz of Hutchinson, Kansas appeared for claimant. Mark J. Hoffmeister of Overland Park, Kansas, appeared for the self-insured respondent.

ISSUES

The Administrative Law Judge (ALJ) found the evidence failed to prove it was more probably true than not true that claimant sustained an accidental injury arising out of and in the course of her employment. Accordingly, claimant's request for preliminary relief was denied by the ALJ.

Claimant argues the ALJ erred in finding claimant did not suffer an accidental injury that arose out of and in the course of her employment with respondent. Claimant asks the Board to reverse the Order of the ALJ and to grant her requests for temporary total disability benefits (TTD) and medical compensation.

Respondent asserts the ALJ correctly found claimant failed to meet her burden of proving she sustained personal injury by accident arising out of and in the course of her employment.

FINDINGS OF FACT

The first of two preliminary hearings was held on July 12, 2011. Claimant, a 32-year-old female, testified she worked for respondent as a housekeeper. On April 9, 2011, claimant was cleaning a patient's room, room 522, when she lifted a linen bag. She

testified the bag was “too heavy”¹ and she injured her right shoulder, lower back and neck. Claimant lifted linen bags every day, but this particular bag was very heavy because at least some of the linens, apparently towels², were wet. Claimant testified that after she lifted the linen bag and sustained her alleged injury, she drug it into the hallway with her left hand. Claimant testified:

A. [by claimant] I drug it with my left hand.

Q. [by claimant’s attorney] Did you use your right arm at all?

A. Nope.

Q. How did you get it into the bin out in the hallway?

A. I asked for help. I asked Connie if she’d help me lift it up.

Q. So somebody helped you put it into the bin?

A. Yeah.

Q. And that was Connie?

A. Yes.

Q. So you used your left arm to pull this bag of linen into the hallway, and then you asked somebody to assist you to put it into the bin?

A. Yes.

Q. Why was that?

A. Because it was heavy and it hurt whenever it dropped on—whenever I lifted it the first time, it hurt my arm. So I wasn’t going to attempt to lift it again by myself. We’ve always been told that if you can’t do something on your own because of it being too heavy or you’re afraid of hurting yourself, you ask for help, and I have no problem asking for help.

Q. On this occasion, you asked somebody to help you put that into the—your bin?

A. Yes.

Q. And this is out in the hallway?

¹ P.H. Trans. (July 12, 2011) at 6.

² *Id.* at 7.

A. Yes.

Q. Were you having difficulty even using your right arm at that point?

A. I just kind of felt like it needed to pop, but I just thought that it wasn't going to be a problem and so I just kept working. I took a couple aspirin and just kept on going through the day.³

According to claimant, Angela Joplin was also in the hallway. Claimant testified she spoke in the hallway with both Connie Cummins and Angela Joplin, housekeeping employees of respondent, about her injury.

Claimant returned to work the next day, but she was unable to work the entire day. She reported her injury to her supervisor and was allowed to return home. Respondent terminated claimant's employment on April 10, 2011, presumably for excessive absenteeism. Respondent sent claimant to the emergency room for treatment and thereafter to Concentra, where she received conservative treatment from April 11 through April 20, 2011. Claimant was also seen by her personal care provider, Dr. Angela R. Canady, on April 26, 2011. The medical records admitted into evidence, consisting of an undated report authored by Dr. Canady and treatment records from Concentra, contain histories consistent with claimant's description of how her accidental injury occurred.

Laura Weas, a nutritional care worker for respondent, testified at the first preliminary hearing that sometime in early April 2011, claimant told Ms. Weas she needed some time off work but had been told by respondent if she missed any more time from work her employment would be terminated. Ms. Weas testified claimant stated: "But I think I figured out a way around that."⁴ Later the same day, Ms. Weas saw claimant again at about 12:30 p.m. to 1:00 p.m. on the fifth floor of the hospital near room 522 or room 523. Ms. Weas said another housekeeper was standing in the hall. Claimant was standing inside the room pulling a bag, and claimant looked at Ms. Weas and said: "Watch this."⁵ Ms. Weas said claimant pulled the bag out of the room, picked the bag up, and threw it into the hamper. Claimant then announced she had hurt her back. Ms. Weas saw no indication claimant was injured or was in pain. Ms. Weas testified nothing more was said, and she left to continue her work. Ms. Weas later told her boss about the incident. Claimant testified she did not tell or suggest to Ms. Weas that she was going to fake an injury.

³ P.H. Trans. (July 12, 2011), at 13-14.

⁴ *Id.* at 18.

⁵ *Id.* at 19.

Also testifying at the first preliminary hearing was Amy Wichmann, an employee relations specialist in the human relations department of respondent. Ms. Wichmann testified that claimant had received a final written warning for excessive absenteeism prior to claimant's alleged work-related injury. The written warning itself is dated February 25, 2011, and was signed by claimant and her supervisor on March 1, 2011.⁶

Ms. Wichmann met with claimant on April 20, 2011, concerning her workers compensation claim. Prior to that date, Ms. Wichmann had received a report from Ms. Weas questioning the legitimacy of claimant's claim. Ms. Wichmann investigated the claim, including interviewing potential witnesses. Because there were inconsistencies in the information her investigation revealed, Ms. Wichmann asked respondent's security supervisor, Jeff Bridges, to check if there was any security video that could provide her with some objective information about the incident. The next day, Mr. Bridges and Ms. Wichmann reviewed some of the video, and she asked Mr. Bridges to put it on a DVD, which he did.

Ms. Wichmann testified the DVD shows film from three security cameras located in the hallway on the fifth floor of the hospital. The DVD includes a depiction of the hallway at the time claimant alleged she was injured. The DVD shows claimant lifting a bag into the housekeeping cart using both hands. She received no assistance in lifting the bag. Claimant later is seen leaving the area, pushing what appeared to be a plastic linen or trash barrel with her left hand and pulling the housekeeping cart with her right hand. No one is seen assisting claimant. Angela Joplin was not present at the time the bag was lifted in the hallway. Connie Cummins appears in the hallway only after the bag is lifted by claimant into the bin.

Claimant objected to the admission of the DVD because claimant's counsel had not been provided a copy of the DVD before the preliminary hearing. The ALJ gave claimant 24 hours to view the DVD and register any objections to its admission. The copies of the DVD provided by defense counsel to the ALJ and to claimant's attorney, however, could not be viewed. The ALJ received a viewable copy of the DVD on July 15, but claimant's attorney did not receive a copy of the DVD until July 18. By the time a viewable copy of the DVD was received by claimant's counsel, the ALJ had already entered his preliminary hearing Order on July 15, 2011, denying benefits to claimant. Claimant's attorney requested Board review of the Order. Claimant maintained that the ALJ erred in admitting the DVD into evidence because claimant's counsel had not been provided a copy of the DVD and allowed time for claimant's counsel to lodge any objections before the ALJ's Order was entered. Board Member David Shufelt reversed the ALJ's Order and remanded the claim with directions to reopen the record to allow claimant the opportunity to lodge

⁶ *Id.*, Resp's Ex. A.

objections to the DVD.⁷ After the entry of Board Member Shufelt's Order, claimant took the depositions of two lay witnesses.

Connie Cummins testified she had seen the DVD, but she did not remember the events occurring as depicted in the DVD. She remembered coming down the hallway and seeing claimant come out of a patient's room with a bag. Ms. Cummins said claimant looked like she was hurting, so Ms. Cummins asked claimant what was the matter. Claimant told her she thought she pulled something. Ms. Cummins said she then lifted up the bag and thought she had helped claimant put it in the cart, although the DVD does not corroborate Ms. Cummins' testimony on that issue. Ms. Cummins also thought she remembered helping claimant take the cart with the bag to the soiled utility area. However, Ms. Cummins said claimant told her a few days later that they had taken the cart to the fourth floor instead.

Angela Joplin testified she did not remember the exact date but remembered an incident where claimant had an injury on the job. On the day of the injury, claimant came out of a patient's room holding her arm like something had happened, and claimant said her arm was hurting. The blue linen bag was already in the cart, and Ms. Joplin did not know who put the bag in the cart. Claimant told Ms. Joplin she had picked up the blue bag and after she put the bag in the barrel on the cart her arm started to hurt. Ms. Joplin said claimant came to work the next day in pain and worked a little. Later claimant contacted her supervisor about her arm hurting, and claimant's supervisor let her go home. Ms. Joplin said there was no question in her mind that claimant was really injured. Ms. Joplin had no indication that claimant was faking an injury.

Neither Ms. Cummins nor Ms. Joplin saw claimant's alleged accident in room 522.

A second preliminary hearing was held on March 6, 2012. The DVD was admitted into evidence without objection by claimant. Also admitted was a printout offered by respondent which confirmed the presence of Ms. Weas on the fifth floor of the hospital at 1:15 p.m. on April 9, 2011.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a

⁷ *Shanor v. Olathe Medical Center, Inc.*, No. 1,055,652, 2011 WL 4942786 (Kan. WCAB Sept. 15, 2011).

preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁸ Whether an accident arises out of and in the course of the worker's employment depends upon the facts associated with each case.⁹

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.¹⁰

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹¹ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹²

⁸ K.S.A. 2010 Supp. 44-501(a).

⁹ *Halford v. Nowak Construction Co.*, 39 Kan. App. 2d 935, 186 P.3d 206. *rev. denied* 287 Kan. 765 (2008).

¹⁰ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995); see *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 955 P.2d 1315 (1997).

¹¹ K.S.A. 2010 Supp. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

¹² K.S.A. 2010 Supp. 44-555c(k).

ANALYSIS

The undersigned Board Member agrees with the ALJ that claimant has not satisfied her burden to prove she sustained personal injury by accident arising out of and in the course of her employment with respondent.

There are a number of troubling inconsistencies between claimant's testimony and the other evidence in the record. Those inconsistencies include:

(1) Claimant testified that she injured her right shoulder, neck, and back when she lifted a linen bag which was at least partially full of wet linen. The injury occurred while claimant was in room 522. However, shortly after the alleged injury, claimant told Angela Joplin that she (claimant) started hurting after the linen bag had been lifted into the barrel on the housekeeping cart, which was located in the hallway, not inside room 522.

(2) Claimant testified that it was Connie Cummings who assisted claimant lift the linen bag into the barrel on the housekeeping cart. However, the DVD shows claimant lifting the linen bag into the bin on the housekeeping cart with no assistance from Ms. Cummins or anyone else. Ms. Cummins also testified that she assisted claimant in lifting the linen bag onto the cart, but the DVD shows that Ms. Cummins was not present when claimant lifted the linen bag onto the cart and did not assist claimant lift the bag.

(3) Claimant testified that when she arrived in the hallway outside room 522, Angela Joplin was in the hallway. However, the DVD and the testimony of Amy Wichmann indicate that Ms. Joplin was not present in the hallway.

(4) Claimant testified that she used her left arm to drag the linen bag from the patient room to the hallway. Claimant said she did not use her right arm at all because of her injury. However, the DVD and Ms. Wichmann's testimony establish that claimant used both hands, unassisted, to lift the bag into the bin.

(5) Although much of the DVD is blurred and of little probative value, the DVD is quite clear that claimant had no assistance in lifting the bag onto the housekeeping chart. Ms. Wichmann's testimony corroborates what the DVD reveals.

(6) Claimant testified that she did not see Laura Weas on the fifth floor on the date of alleged accident. Ms. Wichmann and the DVD indicate that Ms. Weas was on the fifth floor at the time of the alleged injury dropping off a menu in the very room in which

claimant was injured.¹³ Moreover, the testimony of Ms. Weas corroborated Ms. Wichmann's testimony on this question.¹⁴

The testimony of Ms. Weas regarding what claimant told her on the date of the alleged accident is not, in and of itself, dispositive. However, when the testimony of Ms. Weas is added to the other inconsistencies discussed above, it becomes more difficult to find that claimant sustained her burden to prove a work-related accidental injury. The matter is further complicated by the precarious status of claimant's employment with respondent, a situation resulting from claimant's violation of respondent's attendance policy. Again, the claimant having received a final warning about missing more time from work might likely not be determinative evidence by itself. However, the accumulated evidence renders the claim questionable.

That is not to say that there is no evidence which supports claimant's position. The medical records, for example, contain histories which are consistent with claimant's testimony regarding how and when she was injured. However, on the basis of the entire record at this point, the undersigned Board member must agree with the ALJ's holding and deny claimant's claim workers compensation benefits.

CONCLUSION

Claimant has not sustained her burden to prove, by a preponderance of the credible evidence, that it is more probably true than not true that she suffered personal injury by accident arising out of and in the course of her employment with respondent.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Steven J. Howard dated March 7, 2012, is hereby affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of May, 2012.

HONORABLE GARY R. TERRILL
BOARD MEMBER

¹³ P.H. Trans. (July 12, 2011) at 33, 34.

¹⁴ *Id.* at 18.

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Steven J. Howard, Administrative Law Judge